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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 95-88
Table of Allotments,	)	RM-8641
FM Broadcast Stations	)	RM-8688
(Rose Hill, Trenton, Aurora, and	)	RM-8689
Ocracoke, North Carolina)		

To: The Commission

**OPPOSITION TO MOTION TO STRIKE**

Conner Media Corporation ("CMC"), licensee of WBSY, Channel 248A, Rose Hill, NC, by its attorneys and pursuant to Section 1.45(b) of the Commission's rules, hereby opposes the October 11, 2000 "Motion To Strike" ("Motion") filed by Woolstone Corporation ("Woolstone") with respect to CMC's "Reply To Opposition To Application For Review" in the above-referenced proceeding.

In support hereof, the following is respectfully shown:

By way of background, on August 21, 2000, CMC filed a timely Application For Review ("AFR") of the Memorandum Opinion and Order ("MO&O"), DA 00-1312 (released June 16, 2000), 65 FR 44986 (published July 20, 2000), issued by the Chief, Allocations Branch, Mass Media Bureau (the "Bureau"), in the above-captioned proceeding.<sup>1</sup> The MO&O had denied CMC's request for reconsideration of the Bureau's Report and Order, 11 FCC Rcd 21223 (Chief, Alloc. Br., 1996) ("R&O"), which had denied CMC's proposal to reallocate Channel 284A from Rose Hill to Trenton, NC as a Class C2 allotment and to modify the WBSY license accordingly; instead, a counterproposal to allot Channel 283A to Aurora, NC, was granted. The Bureau also rejected CMC's proposed alternative allotment of Channel 221A to Aurora.

Woolstone, whose permit for the unbuilt Aurora facility is conditioned on the outcome of

<sup>1</sup> A more complete statement of the case is set forth at pages 1 – 4 of the Application For Review.

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this proceeding, opposed the AFR (“Opposition”) on September 5, 2000. Woolstone contended, inter alia, that “[t]here is virtually no likelihood that it would be possible to find a suitable, fully-spaced site from which to operate a station on Channel 221A at Aurora.”<sup>2</sup> To support that contention, Woolstone resubmitted a three year old affidavit that had been given by Mr. Howard Spence (“1997 Spence affidavit”) of Weyerhaeuser Company (“Weyerhaeuser”), an owner of land in the area, stating, in pertinent part, that “Weyerhaeuser is presently unwilling to consider the sale or lease of any portion of this land ....”<sup>3</sup> Woolstone’s resubmission of the 1997 Spence affidavit could have created the impression that the affidavit continued to represent Weyerhaeuser’s position.

Actually, Weyerhaeuser had changed its position. By letter dated June 20, 2000, Ms. Maro Imirzian of Weyerhaeuser’s corporate headquarters had offered CMC a 3+/- acre parcel of Weyerhaeuser property for construction of a new radio tower.<sup>4</sup> When CMC received Woolstone’s Opposition resubmitting the 1997 Spence affidavit, CMC advised North Carolina-based media broker Charles “Zoph” Potts, who has been assisting CMC in pursuing the Weyerhaeuser property. Mr. Potts then obtained Mr. Spence’s September 14, 2000 statement reaffirming Weyerhaeuser’s current interest in providing property for a radio tower.<sup>5</sup> CMC’s technical consultant, Timothy L. Warner, then confirmed that the Weyerhaeuser site would satisfy the spacing and coverage requirements for a Channel 221A facility licensed to Aurora<sup>6</sup>. These materials directly responded to Woolstone’s charge of no likelihood that a suitable fully-

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<sup>2</sup> Opposition at para. 16.

<sup>3</sup> Opposition at Exhibit 2. Underlining added. Woolstone had originally submitted the affidavit to support its “Opposition To Petition To Deny Or Defer,” filed October 22, 1997, in response to CMC’s Petition To Deny Woolstone’s application for Channel 283 at Aurora (File No. BPH-970227MD).

<sup>4</sup> At note 1 of its Motion, Woolstone questions why CMC did not submit Ms. Imirzian’s letter in this proceeding upon receipt. The offer was made in the context of CMC’s pursuit of another business opportunity, which CMC considers to be proprietary. The offer became relevant to this proceeding when Woolstone resubmitted Mr. Spence’s outdated affidavit.

<sup>5</sup> Reply at Exhibit A.

<sup>6</sup> Reply at Exhibit C.

spaced site for Channel 221A could be found.

CMC's proffer of these additional materials was particularly important to counter any misimpression that could result from Woolstone's resubmission of the 1997 Spence affidavit. CMC expressly recognized that Section 1.115(c) generally bars submissions of new evidence on review, and therefore requested either a rule waiver to update the record, or referral back to the Bureau for consideration of the new evidence.<sup>7</sup>

The Commission has previously waived Section 1.115(c) where doing so would serve the public interest.<sup>8</sup> In the instant case, consideration of the new evidence will serve the public interest by ensuring that the record before the Commission is purged of the superseded 1997 Spence affidavit, avoiding the possibility of a Commission decision based on invalid evidence.

There is no basis for Woolstone's intimation at paragraph 9 that CMC suggested the remand alternative to "prolong" this proceeding. CMC is seeking to improve the facilities of its existing and licensed station, WBSY, which would best be served by an expeditious grant of the relief it requests. It is Woolstone that has needlessly prolonged this proceeding, by submitting its strike motion. At paragraph 9, Woolstone states that it is "prepared to stipulate" that Weyerhaeuser is now willing to negotiate on a tower site. The submission of a stipulation, rather than its strike motion, would have facilitated a far more expeditious track.

As a final matter, CMC respectfully notes that a large swath of Woolstone's Motion attempts to improperly respond to CMC's reply on the merits. This is a classic abuse of process which should not be tolerated.<sup>9</sup> However, to ensure a complete record, CMC wishes to note the

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<sup>7</sup> Reply at pages 2-3.

<sup>8</sup> Mercury PCS II, LLC, 15 FCC Rcd 9654 at n. 52 (2000), citing Sperzel v. NEC Telephone, Inc., 86 FCC 2d 97 at para. 9 (1981); Silverman v. KOOL-TV, 63 FCC 2d 507 at n.1 (1977); Sage v. WHEN-TV, 63 FCC 2d 148 at n.2 (1977).

<sup>9</sup> The term "abuse of process" has been defined as "the use of a Commission process, procedure or rule to achieve a result which that process, procedure or rule was not designed or intended to achieve or, alternatively, use of such process, procedure, or rule in a manner which subverts the underlying intended purpose of that process, procedure, or rule." High Plains Wireless, L.P., 15 FCC Rcd 4620 at para.9 (Dep. Chief, WTB, 2000) citing First Report and Order, "Prevention of

following:

Woolstone's so-called "Motion To Strike" questions whether Woolstone would be able to satisfactorily negotiate with Weyerhaeuser to use its property for a radio tower.<sup>10</sup> That concern is irrelevant at this juncture. The ability of a particular applicant to negotiate to use a particular site is a purely private matter more appropriately considered at the application stage.

Woolstone also contends that the Weyerhaeuser site would be "short-spaced" to various stations.<sup>11</sup> First of all, CMC is not proposing to change the allotment coordinates proposed for Channel 221A at Aurora to the Weyerhaeuser site. Rather, CMC submitted the Weyerhaeuser site evidence for the sole purpose of countering Woolstone's assertion that a suitable site would be unavailable. It is well-established that the spacing rules are more flexible in application proposals than in allotment proposals, as long as a fully-spaced allotment site has been established.<sup>12</sup> Moreover, Woolstone's alleged "short spacings" were adequately resolved in Timothy Warner's spacing study of the Weyerhaeuser site.<sup>13</sup> To wit: The WBJD modification application is a contingent application, expressly dependent on final action in the instant proceeding. The licensee of NCE FM WAAE gave CMC a written commitment to propose a non-conflicting frequency, which CMC previously submitted in this proceeding.<sup>14</sup> The allotment

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Abuse of the Renewal Process," 4 FCC Rcd. 4780, 4793 (1989), Silver Star Communications-Albany, Inc., 3 FCC Rcd. 6342, 6352 (1988), Notice of Proposed Rulemaking, "Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes", 2 FCC Rcd. 5563 (1987), and Report, Order and Policy Statement, "Policy Regarding Character Qualifications In Broadcast Licensing," 102 FCC 2d 1179 (1986), recon. granted in part and denied in part, 1 FCC Rcd. 421 (1986), appeal dismissed mem. sub nom National Assoc. for Better Broadcasting v. FCC, No. 86-1179 (D.C. Cir. June 11, 1987), (1996).

Woolstone's attempt to shoehorn substantive arguments into its so-called "Motion To Strike" fits squarely within the above-quoted definition of abuse of process.

<sup>10</sup> Opposition at para. 10.

<sup>11</sup> Opposition, paras. 5-7.

<sup>12</sup> See e.g. Cloverdale, Montgomery and Warrior, Alabama, FCC 00-169 at para. 6, (released June 14, 2000).

<sup>13</sup> Reply at Exhibit C.

<sup>14</sup> Reply of Duplin County Broadcasters To Counterproposal, MM Docket No. 95-88, filed September 5, 1995, at Exhibit B.

for Channel 224C1, Ocracoke, NC, is defective for failure to demonstrate that a 70 dBu signal can be placed over Ocracoke from the allotment coordinates, a matter which can be substantiated objectively by application of the Commission's standard propagation methodology.<sup>15</sup>

Woolstone's pictures of drainage ditches in the northeast corner of the Weyerhaeuser site<sup>16</sup> are out of context and highly misleading. Exhibit 1 hereto is a statement by Mr. Potts, which notes that these ditches were constructed to provide the drainage necessary for Weyerhaeuser's use of the property; Mr. Potts attaches pictures of other portions of the property which he concludes are well-suited for tower construction. At Exhibit 2 hereto, Mr. Warner attaches an aerial photograph of the entire property, and likewise concludes that the site should be suitable for tower construction.

The purpose of the designation of a large portion of Weyerhaeuser-owned property as a bear sanctuary<sup>17</sup> is to prevent any hunting of black bears within the sanctuary area. At Exhibit 3 hereto, Mr. Spence explains that the "bear sanctuary" designation would not preclude construction of a tower, and if the site is sold for the construction of the radio tower, the new property owner would have the prerogative of ending the "bear sanctuary" designation. Woolstone's question regarding whether it would be possible to obtain necessary permits<sup>18</sup> is purely speculative.

To summarize, Woolstone has stated it is prepared to stipulate that Weyerhaeuser is now willing to negotiate on a tower site. Woolstone should enter its stipulation to expedite resolution of this matter. Absent such a stipulation, the new evidence CMC proffered in response to Woolstone's outdated and misleading resubmission of the superseded 1997 Spence affidavit is necessary to ensure an accurate record and should be considered. Woolstone's attempt to

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<sup>15</sup> The Ocracoke applicant erroneously assumed a height above every terrain of 300 meters as the basis of its allocation, rather than the 299 meter maximum set forth in Section 73.211(b), thus exaggerating the predicted coverage. See Reply at page 4.

<sup>16</sup> Motion at Exhibit 1, photographs 1 and 2.

<sup>17</sup> Motion at Exhibit 1, photograph 3.

<sup>18</sup> Motion at para. 4.

respond substantively to CMC's reply under the guise of a "Motion To Strike" is an abuse of the Commission's processes and in any event lacks merit.

WHEREFORE, the premises considered, CMC respectfully requests that Woolstone's Motion To Strike be DENIED.

Respectfully submitted,

**CONNER MEDIA CORPORATION**

By 

Peter Gutmann  
Ellen Mandell Edmundson  
Its Attorneys

Pepper & Corazzini, L.L.P.  
1776 K Street, NW, 200  
Washington, DC 20006  
(202) 296-0600

October 19, 2000

## EXHIBIT 1

October 17, 2000

Ms. Ellen Mandell Edmundson  
Pepper & Corazzini - L L P  
Attorneys at Law  
1776 K Street  
Washington, DC 20006

**Re: Romico Road - NC Highway 33 - Tower Site for Connor Media**

Dear Ms. Edmundson:

On October 16, 2000 I talked with Howard Spence concerning the potential tower site. Mr. Spence is the North Carolina Timberlands Land Acquisition Supervisor with Weyerhaeuser. He is responsible for the supervision and maintenance of Weyerhaeuser's land holdings in eastern North Carolina. Obviously, Mr. Spence is most knowledgeable concerning both the physical features of the land as well as the legal and enviromenral aspects of the various properties.

Mr. Spence acknowledges that the site located on highway 33 and Romico Road is situated within the Gum Swamp Wildlife Bear Sanctuary. He indicated there would be no restrictions on the transfer or lease of the site due to it's being situated at the edge of the Bear Sanctuary. Mr. Spence knew of no other restrictions from conservation groups or State Wildlife agencies that would preclude the use of the site for a tower location.

The site in question has two large ditches; one is located on the north side and the other on the east side of the property. These ditches were constructed to provide the necessary drainage for Weyerhaueser's holdings in the area. The site is situated well above the water level of the ditches. There is a healthy stand of young pine trees on the site and there is no evidence of standing water on the property.

Please refer to the attached photographs of the site and of the area in question. These photos were taken during an on site inspection Monday, October 16, 2000. Several of the photos show the proximity of the site to Highway 33. These same photos show significant growth of pine trees on the site. Weyerhaeuser previously removed timber from the site and then planted new trees. Other photos show a new residential area being constructed across Highway 33 from the site.



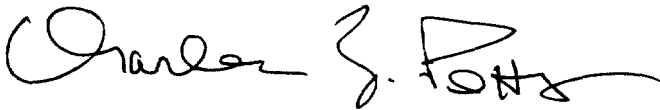
*Based on my experience as a Broadcast Owner/Operator and as a Media Broker - the site appears to be well suited for a tower/transmitter location. The site is not being carved out of a wilderness area. It fronts on Highway 33 and Romico Road provides the eastern boundary. The site will be immediately accessible by vehicle and is adjacent to electrical power.*

*It should be noted that Weyerhaeuser is constructing a large residential development on the south side of NC Highway 33 - a part of which is directly across from the subject site.*

*Aurora, the city of license, is located only seven miles from the site via NC Highway 33 which is the main East-West highway for the community.*

*Please let me know if we may supply you with additional information.*

*Sincerely,*

A handwritten signature in black ink, appearing to read "Charles Z. Potts". The signature is fluid and cursive, with a large initial "C" and a stylized "P".

*Charles Z. Potts, Chairman*

*CZP / mh*



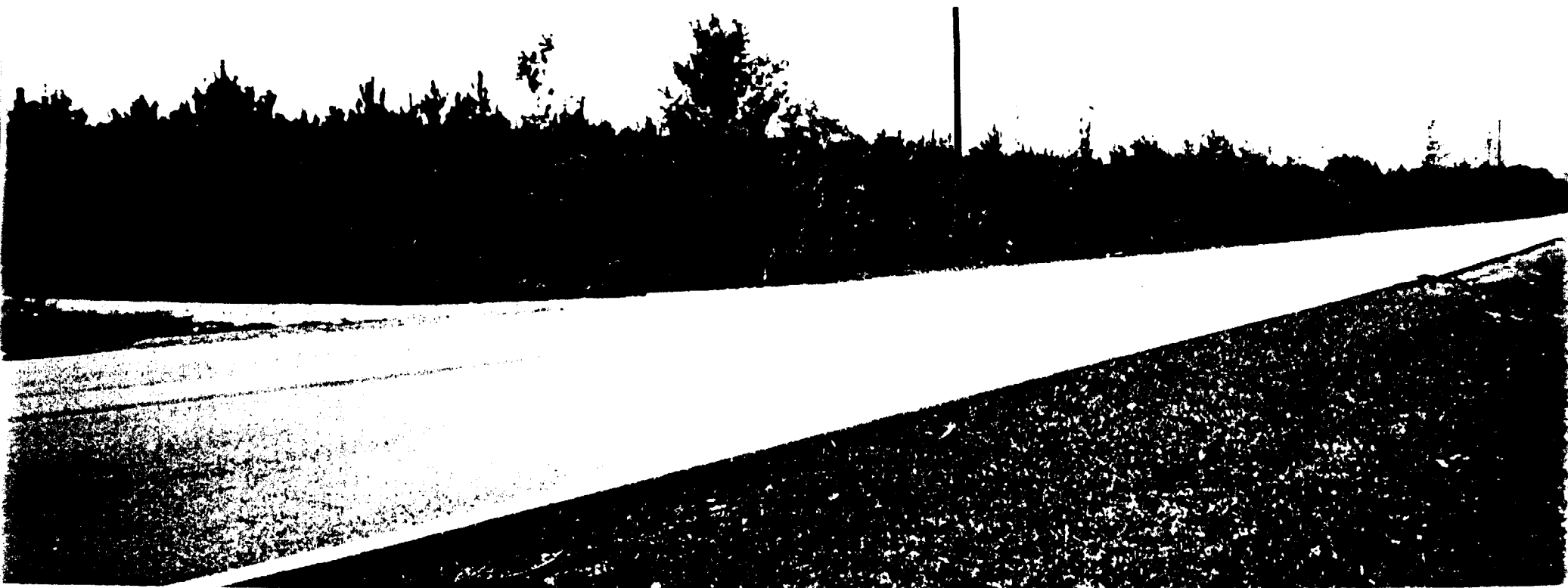
10/16/00

Looking west on Highway #33 with site on left, beyond automobile. Note significant stand of trees on site.



10/16/00

Looking at site across Highway #33 towards the southwest. Note significant stand of trees on site.



10/16/00

Looking across Highway #33 at site with Romico Road located in the middle left side of photo. Note significant stand of pine trees on site.



10/16/00

Looking at site from Romico Road towards the north. Note significant stand of trees.



10/16/00

Looking across Highway #33 at site. Individual is situated at Romico Road which is northeast corner of site. Note significant stand of trees on site.



10/16/00

Entrance to Weyerhaeuser residential development on north side of Highway #33  
west of site.

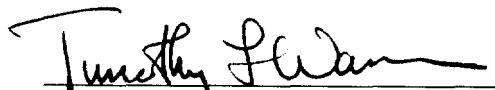
## EXHIBIT 2



## DECLARATION

I, Timothy L. Warner, hereby declare as follows:

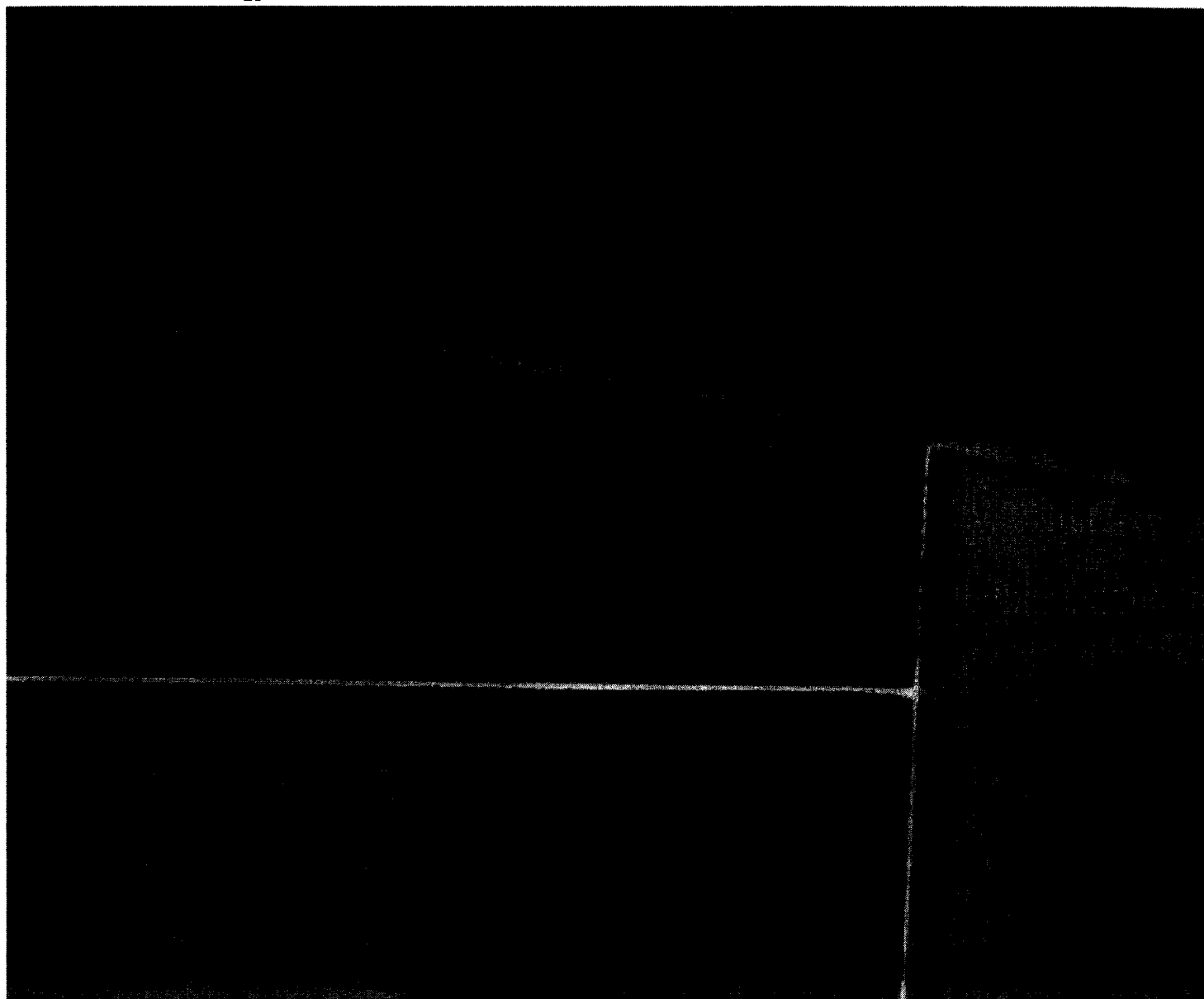
1. I am a Professional Engineer in North Carolina, with over thirty years of experience in the engineering of broadcast and other communications systems.
2. This declaration is being given at the request of Conner Media Corporation ("CMC"), to respond to certain photographs submitted by Woolstone Corporation ("Woolstone") in MM Docket No. 95-88. The photographs allegedly depict the "northeast corner" of a site bounded by NC Highway 33 to the north and Romico Road to the east, and several hundred yards west of the Smith Creek Bridge. Woolstone's photographs are of drainage ditches.
3. I am attaching an aerial photograph of the entire property. Although drainage ditches can be seen at the northeast corner of the property, other portions of the Weyerhaeuser land support trees large enough to grow for timber.
4. Woolstone has not submitted a geotechnical Survey of the area. However, I wish to observe that if Woolstone's allegation is that this property is swampland, radio station towers are frequently located in wet or swampy areas - particularly AM radio towers, to take advantage of the high ground conductivity of such areas.
5. NC Highway 33 on the north side of the property is a paved road, which illustrates that proper construction techniques can provide permanent dry surfaces in the area.
6. It is my professional opinion that the site should be suitable for tower construction. Suitable foundations can be designed to take into account the particular soil types and water table.
7. I declare under penalty of perjury that the foregoing is true and correct to my personal knowledge.

  
Timothy L. Warner, P.E.

Dated: 18 October 2000

8 km SW of Lowland, North Carolina, United States 12 Jul 1996

Zoom 2m



North ↑

0 200M 0 200yd

Image courtesy of the US Geological Survey.

OrigMetaTag = '3507643SE' Center Lon,Lat= -76.64256,35.26980 Running Time 16 ms Time 10/18/2000 1:21:11 PM to 10/18/2000 1:2

### EXHIBIT 3



Date: October 17,2000

From: Howard Spence

Location:NC Timberlands - New Bern

Subject: Land for Radio Tower site

To: Zoph Potts

To follow up our telephone conversation this morning and yesterday, the proposed radio tower site that we have discussed is located within a large ownership of Weyerhaeuser Company that is designated as a "Bear Sanctuary". This designation prevents any hunting of black bear within the sanctuary area.

If we were able to work out an arrangement between Weyerhaeuser Company and your client to either lease or buy the proposed tower site location, I don't see where the "Bear Sanctuary" designation would cause a problem. If it were a lease arrangement, the site would still be a part of the "Bear Sanctuary" since we would still own the property in fee. If Weyerhaeuser sold the site to your client, they would have the option of leaving it in or taking it out of the "Bear Sanctuary" designation.

I hope this is sufficient to answer your questions.

Sincerely,

A handwritten signature in cursive script that reads "Howard Spence".

Howard Spence

**CERTIFICATE OF SERVICE**

I, Regina S. McFadden, a secretary in the law firm of Pepper & Corazzini, L.L.P., do hereby certify that true copies of the foregoing "Reply to Opposition To Application For Review" were sent this 19th day of October, 2000, by U.S. first class mail, postage prepaid, to the following:

Gary S. Smithwick, Esquire  
Smithwick & Belendiuk, P.C.  
5028 Wisconsin Avenue, NW  
Washington, DC 20016

Vincent J. Curtis, Jr., Esquire  
Anne Goodwin Crump, Esquire  
Fletcher Heald & Hildredth, P.L.C.  
1300 North 17th Street - 11th Floor  
Arlington, VA 22209

  
\_\_\_\_\_  
Regina S. McFadden